

This Opinion is Not a  
Precedent of the TTAB

Hearing: May 13, 2021

Mailed: June 10, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*AWP USA Inc.*

*v.*

*Chubb INA Holdings Inc.*  
—

Cancellation No. 92070407  
—

David Ludwig and Hyung Gyu Sun of Dunlap Bennett & Ludwig PLLC  
for AWP USA Inc.

Jenifer deWolf Paine, Cynthia J. Walden, and Ryan Steinman of Fish & Richardson  
P.C. for Chubb INA Holdings Inc.  
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Before Wolfson, Goodman, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Chubb INA Holdings Inc. (“Respondent”) owns Registration No. 5323248 of the standard character mark CHUBB TRAVEL SMART (TRAVEL disclaimed) for “Downloadable mobile applications for planning trips, receiving travel, weather, medical, safety, health, and security information, receiving security alerts, and

currency converter tool,” in International Class 9.<sup>1</sup> AWP USA Inc. (“Petitioner”) petitioned to cancel Respondent’s registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), alleging that Respondent’s mark so resembles Petitioner’s claimed common-law mark TRAVELSMART for a downloadable mobile software application for providing information, services and support to travelers as to be likely, when used in connection with the goods identified in Respondent’s registration, to cause confusion, to cause mistake, or to deceive.

The case is fully briefed,<sup>2</sup> and counsel for the parties appeared at a video hearing before the panel on May 13, 2021. We deny the Petition for Cancellation because Petitioner failed to show both its entitlement to petition to cancel Respondent’s registration and its priority.

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<sup>1</sup> Respondent’s registration issued on October 31, 2017 from an application claiming first use of the mark and first use of the mark in commerce in 2016.

<sup>2</sup> Citations in this opinion to the briefs and other docket entries refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Petitioner’s original main brief appears at 19 TTABVUE. After it was filed, Petitioner moved with the consent of Respondent to file an amended main brief that was identical in substance to its original brief, but also included the required tables of contents and authorities, which had been omitted from its original main brief. 20 TTABVUE. The Board granted the motion, stating that “Petitioner’s amended opening brief (20 TTABVUE 6-20) is Petitioner’s operative opening brief.” 21 TTABVUE 1-2. We will cite to Petitioner’s amended main brief at 20 TTABVUE in this opinion. Respondent’s brief appears at 22 TTABVUE, and Petitioner’s reply brief appears at 25 TTABVUE.

## I. Record

The record consists of the pleadings;<sup>3</sup> the file history of Respondent's registration, by virtue of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1); four notices of reliance filed by Petitioner; and three notices of reliance filed by Respondent.

Petitioner's four Notices of Reliance cover (1) Internet webpages, including media articles, 11 TTABVUE 8-92;<sup>4</sup> (2) Respondent's Responses to Petitioner's First Set of Interrogatories, 12 TTABVUE 5-20; (3) an article from the *International Travel & Health Insurance Journal*, 13 TTABVUE 5-7; and (4) the file history of Respondent's registration. 14 TTABVUE 5-48.<sup>5</sup>

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<sup>3</sup> Respondent denied all of the allegations in Petitioner's Petition for Cancellation, except Respondent admitted that "Petitioner is listed on the U.S. Patent and Trademark Office database as the applicant of U.S. Trademark Application Number 87/901,868, which was filed on May 1, 2018," 4 TTABVUE 2 (Answ. ¶ 1), and that Respondent "filed an application for CHUBB TRAVEL SMART, U.S. Trademark Application Number 87/405,857 on April 10, 2017, and that its mark is now registered." *Id.* at 3 (Answ. ¶ 3). We discuss the first admission below. Respondent also asserted three self-styled affirmative defenses, two of which amplify its denials of a likelihood of confusion, and the third of which purports to reserve the right to add affirmative defenses, which is not an affirmative defense. *FDIC v. Mahajan*, 923 F. Supp. 2d 1133, 1141 (N.D. Ill. 2013). With regard to Applicant's third affirmative defense, we note that a defendant cannot reserve unidentified defenses in its answer because that does not provide a plaintiff with fair notice of such defenses. Regardless of the characterization and sufficiency of the purported affirmative defenses, "because [Respondent] raised them in the Answer but did not pursue them at trial, we consider them waived." *U.S. Olympic Comm. v. Tempting Brands Neth. B.V.*, 2021 USPQ2d 164, at \*4 (TTAB 2021).

<sup>4</sup> Petitioner's First Notice of Reliance contains several blank pages, 11 TTABVUE 25, 31-33, 35, 59-63, and 80-82, and many other pages that are borderline illegible, even when enlarged. With respect to the latter pages, "Petitioner has a duty to ensure that the evidence it submits is legible." *Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1758 (TTAB 2013), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014). "[T]he Board can only review evidence that is clear and unobstructed so we have considered this evidence to the extent it is legible and we are able to read the entire content of the evidence." *Id.*

<sup>5</sup> It was unnecessary for Petitioner to make the file history of record because, as noted above, it automatically "forms part of the record of the proceeding without any action by the parties . . ." Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1).

Respondent's three Notices of Reliance cover (1) Internet webpages showing third-party use of TRAVEL SMART marks for various goods and services, 15 TTABVUE 8-131; (2) dictionary definitions of the word "smart," 16 TTABVUE 5-42; and (3) copies of third-party registrations of SMART-formative marks for various goods and services. 17 TTABVUE 78-312.

## **II. Evidentiary Objections**

Respondent "objects to Petitioner's characterization of its evidence in its Brief." 22 TTABVUE 9. Specifically, Respondent challenges Petitioner's argument that its First Notice of Reliance contains evidence going to various issues in the case, including "Petitioner's senior use of its TRAVELSMART mark," *id.* at 10 (quoting 20 TTABVUE 12), because "Petitioner's First Notice of Reliance does not contain admissible evidence of any of these things, as detailed below in Section VI," *id.*, which section is directed to Petitioner's claim of priority. Respondent also challenges Petitioner's Third Notice of Reliance on similar grounds. *Id.*

In its reply brief, Petitioner argues that "[a]ll of [Respondent's] trial evidence that was submitted to the Board in this matter . . . must be stricken because none of it was produced in discovery." 25 TTABVUE 17.

We need not address Respondent's objections in detail because none is outcome-determinative. We consider the substance of Respondent's objections to the admissibility of Petitioner's evidence of priority in our analysis of that issue below because "[w]ith these types of objections, the Board is capable of assessing the proper evidentiary weight to be accorded the . . . evidence, taking into account the concerns

raised by the objections.” *Tempting Brands*, 2021 USPQ2d 164, at \*5. With respect to Petitioner’s objections, because we do not rely on any of Respondent’s evidence to decide this case, we need not rule on Petitioner’s eleventh-hour request to exclude it.

### **III. Petitioner’s Entitlement to Petition to Cancel Respondent’s Registration<sup>6</sup>**

A plaintiff’s entitlement to a statutory cause of action for opposition or cancellation is a threshold issue in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). Petitioner may petition to cancel Respondent’s registration if such cancellation is within the zone of interests protected by the statute, 15 U.S.C. § 1064, and Petitioner has a reasonable belief in damage that is proximately caused by the continued registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020), *cert. denied*, \_\_\_ U.S. \_\_\_ (2021). Petitioner must establish its entitlement to petition to cancel

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<sup>6</sup> Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act under the rubric of “standing,” and the parties here have done so as well. 20 TTABVUE 17 (arguing that “Opposer Has Standing to Oppose the Application” [sic]); 22 TTABVUE 18 (arguing that “Petitioner has not proven standing to petition to cancel the CHUBB TRAVEL SMART registration”); 25 TTABVUE 8 (arguing that “Petitioner Clearly Has Standing to Petition to Cancel”). Despite the change in nomenclature, the substance of the analysis of this issue in our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remains applicable. *See Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at \*2 (TTAB 2020). To avoid the creation of stilted language through editing, we generally will not replace the term “standing” with “entitlement to a statutory cause of action” when we quote or discuss the parties’ arguments using “standing” to discuss this issue, or prior decisions using that term.

Respondent's registration by a preponderance of the evidence. *See, e.g., Sterling Jewelers, Inc. v. Romance & Co.*, 110 USPQ2d 1598, 1602 (TTAB 2014).

“The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading].” *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1039 (TTAB 2018) (quoting *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982)). Petitioner adequately pleaded its entitlement to assert a statutory cause of action,<sup>7</sup> but “[m]ere allegations or arguments in support of standing are insufficient proof thereof. A plaintiff cannot rest on mere allegations in its complaint or arguments in its brief to prove standing.” *Id.* (citing *Lipton Indus.*, 188 USPQ at 188). Accordingly, we must determine whether Petitioner proved at trial that it is entitled to petition to cancel Respondent's registration.

Petitioner's entire argument in the section of its main brief devoted to its standing essentially parrots its allegations in its Petition for Cancellation:

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<sup>7</sup> Petitioner alleged, inter alia, that it owns the TRAVELSMART mark, 1 TTABVUE 4 (Pet. for Canc. ¶¶ 1-2); that there is a likelihood of confusion arising from the use of Respondent's registered CHUBB TRAVEL SMART mark, *id.* at 5 (Pet. for Canc. ¶ 6); that “[c]ontinued registration of Respondent's CHUBB TRAVEL SMART mark is further likely to cause the public to assume erroneously that Respondent or its goods have been authorized, sponsored, or licensed by Petitioner, thereby irreparably damaging Petitioner and Petitioner's goodwill in its TRAVELSMART mark under 15 U.S.C. § 1052(d),” *id.* (Pet. for Canc. ¶ 7); that “Petitioner is likely to be damaged by continuance of the Registration on these goods because the registered CHUBB TRAVEL SMART mark on these items will remain a cloud on Petitioner's legal right to continue to use, develop, and expand the use of Petitioner's TRAVELSMART Mark,” *id.* (Pet. for Canc. ¶ 9); and that “Petitioner's continued and legal use of the TRAVELSMART mark will be impaired by the continued registration of the CHUBB TRAVEL SMART mark.” *Id.* at 6 (Pet. for Canc. ¶ 13). *See Corcamore*, 2020 USPQ2d 11277, at \*8.

Registrant seeks to improperly enjoy unrestricted federal protection of the CHUBB TRAVEL SMART mark for travel-related mobile application software. If the registration of the mark is maintained, it will continue to constitute prima facie evidence of Registrant's exclusive right to use the CHUBB TRAVEL SAMRT [sic] mark in connection with travel-related mobile application throughout the United States. Such use of the mark by Registrant will inevitably cause a likelihood of confusion among consumers as to the sources of the CHUBB TRAVEL SMART mark and Petitioner's TRAVELSMART mark for travel-related mobile apps because the marks are substantially similar, Petitioner and Registrant's goods are highly related and in part identical, and the goods' trade channels overlap. As such, Petitioner has a direct and personal stake in the outcome of the current cancellation proceeding and reasonably believes it has been and will continue to be damaged by the registration of Registrant's confusingly similar mark. T.B.M.P. § 303.03.

20 TTABVUE 17.<sup>8</sup> In the "STATEMENT OF THE FACTS" portion of its main brief, Petitioner states that it filed an application to register TRAVELSMART that had been refused based on Respondent's registration. *Id.* at 15. Petitioner did not make the application of record.

Respondent responds that "Petitioner has not proven standing to petition to cancel the CHUBB TRAVEL SMART registration." 22 TTABVUE 18. Respondent argues that Petitioner claims standing based on the application to register TRAVELSMART, *id.* at 19, and that the application was not made of record during trial. *Id.* at 19-20 (citations omitted). Respondent further argues that the "printouts from the various websites submitted by Petitioner, absent testimony from a competent witness, are

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<sup>8</sup> Petitioner's citation is to Section 303.03 of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") (June 2020), which discusses the meaning of the word "damage" in Sections 13 and 14 of the Trademark Act.

hearsay” and “do not prove that Petitioner owns its pleaded mark, has sold or distributed products under that pleaded mark, or has any enforceable rights in the pleaded mark.” *Id.* at 20. Respondent concludes that “Petitioner has failed to prove its standing, and this cancellation proceeding should be dismissed.” *Id.*

In its reply brief, Petitioner addresses this issue more expansively, arguing that

in erroneously arguing that Petitioner has not established its standing to petition to cancel Registrant’s CHUBB TRAVEL SMART registration, Registrant states (1) Petitioner did not file a copy of its pleaded pending application and had the status and title of the application admitted into evidence, (2) Petitioner merely presented allegations of standing with no direct proof or corroborating witness testimony regarding its pending application, and that (3) the printed publication evidence Petitioner submitted is hearsay *in toto* and none of it should therefore be considered (TTABVUE No. 22, p. 19-20). The argument seems to have stemmed from Registrant’s serious misunderstandings of what the law requires to establish standing and what constitutes hearsay.

25 TTABVUE 8.

Petitioner further argues that “the case law is clear that standing can be established by nothing more than an admission in the pleadings, which Registrant has already done in this case.” *Id.* Petitioner claims that in *WeaponX*, “the Board held that the applicant’s admission in its answer that the opposer is the owner of the pleaded application is itself sufficient to demonstrate the opposer’s standing to pursue the opposition proceeding,” *id.* at 9, that “Registrant has already admitted in its own Answer that Petitioner is the owner of the pleaded application,” *id.*, and that “under *Weaponx*, standing is established by Registrant’s admission alone, notwithstanding all of the other bases for standing in the record.” *Id.*

Petitioner alternatively argues that it “is well-settled that standing may also be established based on a petitioner’s common-law rights in its mark.” *Id.* Petitioner contends that “it is sufficient to establish standing ‘if the circumstances are such that it would be reasonable for a petitioner to believe that the existence of the respondent’s registration would damage him, e.g., a reasonable belief that there is a likelihood of confusion between the marks, or that the presence on the register of the respondent’s mark may hinder the petitioner in using or registering his mark.’” *Id.* at 9-10 (quoting *Toufigh v. Persona Parfum, Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010)).

In its reply brief, Petitioner summarizes the claimed bases for its standing as follows:

Here, Petitioner filed its trademark application for the TRAVELSMART mark on Petitioner’s mobile application and web-based software (U.S. Trademark Ser. No. 87/901,868), and the assigned examining attorney issued a 2(d) likelihood of confusion refusal on the application, citing the Registrant’s CHUBB TRAVEL SMART mark and concluding that the two marks are confusingly similar and the compared goods/services are closely related. Petitioner also offered into evidence printed publications including, among other things, (1) articles from IPMI Magazine, Richmond Times-Dispatch, and cision.com showing Petitioner’s TRAVELSMART app was marketed by media and advertised to the public as early as year 2013, (2) screenshots from the Google Play [app store] and Apple Store showing Petitioner’s app has been downloaded and installed by users on the Google Play [app store] over 100,000 times, and received approximately 1,200 ratings and reviews with an average of 4.2 out of 5 stars [sic] by its users on the Apple Store, and (3) screenshots from the Apple Store showing Registrant’s CHUBB TRAVEL SMART app has ratings and reviews of an average of 2.3 out of 5 stars [sic] by its users on the Apple Store.

*Id.* at 10 (record citations omitted).

Petitioner dismisses Respondent's arguments that the Internet evidence is hearsay when offered to prove Petitioner's standing by contending that "Petitioner's evidence was not offered to prove the truth of the matter in it," *id.* at 11, but rather that the webpages were offered "for what they show on their face; that the news that Petitioner launched its TRAVELSMART app was widely circulated, advertised, and available to the public. In particular, they demonstrate Petitioner's brand has been marketed and promoted in connection with its goods through these channels." *Id.* According to Petitioner, its "common-law rights that support its reasonable belief of damage are established by showing that Petitioner's TRAVELSMART brand was used and advertised in connection with those goods through websites of third parties such as IPMI Magazine, Richmond Times-Dispatch, and cision.com," *id.*, and "the articles were not offered into evidence to prove the veracity of the statements asserted in them, but for what they demonstrate on their face. Accordingly, they are not hearsay." *Id.*

Petitioner further argues that the screenshots from the Google Play app store and the Apple Store are not hearsay because a hearsay statement "must be made by a human, not a machine." *Id.* at 12. Petitioner claims that "the data and text in the screenshots cannot be hearsay because they are not a [sic] conduct *intended by a human declarant to be assertive.*" *Id.* (emphasis in original).

Petitioner concludes that

Even if we assume that Registrant's own admission that Petitioner is the owner of its pleaded application were not deemed sufficient to prove standing (it is sufficient), it is clear that the evidence made of record by Petitioner, which

is not subject to hearsay objection, shows Petitioner has a personal and “real” stake in the outcome of the proceeding and a reasonable basis of belief that it will be damaged by the likelihood of confusion between the two marks.

*Id.* at 12.

Petitioner’s claim that it is entitled to petition to cancel Respondent’s registration under Section 2(d) thus has two bases: (1) Petitioner’s alleged ownership of its application to register TRAVELSMART, and (2) Petitioner’s alleged common-law rights in the TRAVELSMART mark. We address each claimed basis in turn.

**A. Petitioner’s Alleged Ownership of Its Pleaded Application to Register TRAVELSMART**

In its Petition for Cancellation, Petitioner’s sole allegation regarding its application is as follows:

Petitioner is the owner of U.S. Trademark Serial No. 87/901,868 filed on May 1, 2018 TRAVELSMART in connection with “[d]ownloadable mobile application software for providing information, services and support to travelers, namely, accessing and managing travel insurance policies and filing claims, obtaining travel information and support, geolocation, obtaining country information, translation, obtaining emergency services, medical professional and embassy contact and location information, and making calls to emergency services,” in International Class 009, and “Providing temporary use of web-based software for providing information, services and support to travelers, namely, accessing and managing travel insurance policies and filing claims, obtaining travel information and support, geolocation, obtaining country information, translation, obtaining emergency services, medical professional and embassy contact and location information, and making calls to emergency services,” in International Class 042.

1 TTABVUE 4 (Pet. for Canc. ¶ 1).

In its Answer, Respondent admitted that “Petitioner is listed on the U.S. Patent and Trademark Office database as the applicant of U.S. Trademark Application Number 87/901,868, which was filed on May 1, 2018,” 4 TTABVUE 2 (Answ. ¶ 1), and averred that it lacked sufficient knowledge to admit or deny the remaining allegations in that paragraph, *id.* (Answ. ¶ 1), which has the effect of a denial. Fed. R. Civ. P. 8(b)(5). Notably, Respondent merely admitted that Petitioner is listed as the applicant on the application, not that Petitioner is its owner.

As noted above, Petitioner argues that this admission establishes “that Petitioner is the owner of the pleaded application . . . .” 25 TTABVUE 9. We disagree. “We do not construe this admission as establishing [Petitioner’s] current ownership of the pleaded [application]; instead, we view the admission, albeit somewhat ambiguous, as merely establishing that [Petitioner] is identified as the owner of the” application in the pertinent electronic records of the United States Patent and Trademark Office. *Sterling Jewelers*, 110 USPQ2d at 1601-02 (granting the applicant’s motion for involuntary dismissal of the notice of opposition after holding that the applicant’s admission in its answer that the opposer was “listed as” the owner of its pleaded registration merely established that the opposer was identified as the owner of the registration attached as an exhibit to the notice of opposition). “Indeed, by merely admitting that [Petitioner] ‘is listed’ as the owner of the pleaded [application], it appears that [Respondent] is intentionally avoiding an admission of actual current ownership.” *Id.* at 1602 n.5. We hold that Respondent did not admit in its answer that Petitioner is the owner of the pleaded application.

The absence of other evidence of Petitioner's ownership of the application makes the *Toufigh* decision cited by Petitioner inapplicable. In that case, the petitioner pleaded that his application to register ECSTASY for various bath products had been refused registration under Section 2(d) on the basis of the respondent's registration of ECSTASY for parfum, eau de toilette and cologne. *Toufigh*, 95 USPQ2d at 1874.<sup>9</sup> At trial, he "did not submit a copy of the office action, nor did he testify about such refusal in this testimony," *id.*, but the Board found that his testimony that he had applied for registration was enough to establish his standing.<sup>10</sup> *Id.* Here, Petitioner neither made of record a copy of the application nor provided testimony that Petitioner owned it.

Petitioner's reliance on *WeaponX* is similarly misplaced. Petitioner argues that "under *Weaponx*, standing is established by Registrant's admission alone," 25 TTABVUE 9, but that argument is based on a misreading of *WeaponX*, in which the Board found that the applicant had both admitted that the opposer was the owner of its pleaded application, and conceded that the opposer's application had been suspended because of applicant's earlier-filed application:

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<sup>9</sup> The Board noted that this allegation alone was insufficient to establish the petitioner's standing, indicating that it had not been admitted by the respondent. *Toufigh*, 95 USPQ2d at 1874.

<sup>10</sup> In *Spirits Int'l, B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birliigi*, 99 USPQ2d 1545 (TTAB 2011), the Board cited *Toufigh* in holding that the opposer's submission of a pleaded application to register a mark arguably similar to the applicant's mark, for goods arguably related to the applicant's goods, sufficed to show the opposer's "reasonable belief of damage by showing that it possesses a real interest in the proceeding, and is not an intermeddler," even though "applicant's application was not cited as a bar to the registration of opposer's mark." *Id.* at 1548.

In the notice of opposition, Opposer alleges its standing by pleading that it is the owner of trademark application Serial No. 86138495 for the mark WEAPONX. In its trial reply brief, Opposer further maintains that it has standing to pursue this case because it was advised that the mark in its pleaded pending application will be refused registration when and if Applicant's involved application matures into a registration. However, Opposer failed to submit a copy of its pleaded pending application showing the current status and title of the application or the Office Action noting the advisory refusal during its assigned testimony period. . . . In order for Opposer's pleaded pending application to be received in evidence and made part of the record, Opposer had to file a copy of its pleaded pending application showing the current status and title under its notice of reliance during its assigned testimony period. . . . Alternatively, Opposer could have introduced into evidence witness testimony . . . regarding its pending application and the status thereof. . . . Notwithstanding the foregoing, the Board notes that Applicant, in its answer, admitted that Opposer is the **owner** of trademark application Serial No. 86138495 for the mark WEAPONX. Additionally, in its trial brief, Applicant concedes that "[b]ecause the applicant was the senior filer, the opposer's application was suspended and the applicant's application proceeded with prosecution . . . ." Applicant's admission **and concession** establishes that Opposer is the owner of application Serial No. 86138495 for the mark WEAPONX and that Opposer's application was suspended in light of Applicant's earlier-filed involved application. Therefore, Applicant's admission **and concession** are sufficient to demonstrate Opposer's standing to pursue this case.

*WeaponX*, 126 USPQ2d at 1039-40 (emphasis added and internal citations omitted).

*See also Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 11526, at \*5-6 (TTAB 2020)

(finding that the petitioner established that it was entitled to petition to cancel the respondent's registration based on the respondent's admission that the petitioner owned the pleaded application, petitioner's trial testimony regarding the refusal of its application based on respondent's registration, and the respondent's assertion in

its brief that “assume[d] the correctness of Petitioner’s allegation that Petitioner’s application was refused based on Respondent’s registration . . .”).

Here, unlike in *WeaponX* and *Peterson*, Respondent neither admitted Petitioner’s ownership of its pleaded application, nor conceded or assumed in its brief that Petitioner’s application has been refused registration based on Respondent’s registration. To the contrary, Respondent’s brief states that “Petitioner has merely presented *allegations* of standing with no direct proof or corroborating witness testimony regarding its pending application, the status thereof, or the alleged damage resulting from Registrant’s mark.” 22 TTABVUE 20 (emphasis in original).

Because Petitioner failed to submit evidence regarding its pleaded application, either under notice of reliance or through testimony, and Respondent did not admit Petitioner’s ownership of the application or concede its refusal based on Respondent’s registration, Petitioner cannot rely on its pleaded application to establish that it is entitled to petition to cancel Respondent’s registration.

**B. Petitioner’s Alleged Ownership of Its Pleaded Common-Law TRAVELSMART Mark**

Petitioner’s alternative position in its reply brief is that it is entitled to petition to cancel Respondent’s registration based on its alleged ownership and prior use of the common-law TRAVELSMART mark.<sup>11</sup> To show that it owns the alleged mark, Petitioner relies solely on the documents attached to its First and Third Notices of Reliance, which Petitioner describes as including “articles showing Petitioner’s

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<sup>11</sup> Respondent’s Answer denied the allegations in the Petition for Cancellation regarding Petitioner’s alleged common law use of TRAVELSMART. 4 TTABVUE 3 (Answ. ¶¶ 2, 4-13).

TRAVELSMART app was marketed by media and advertised to the public as early as year 2013,” 25 TTABVUE 10, and “screenshots from the Google Play [app store] and Apple Store showing Petitioner’s app has been downloaded and installed by users on the Google Play [app store] over 100,000 times, and received approximately 1,200 ratings and reviews with an average of 4.2 out of 4 starts [sic] by its users on the Apple Store.” *Id.*

In the “STATEMENT OF THE FACTS” section of its main brief, Petitioner cites many of these pages as supporting evidence for a host of factual statements under the section heading “Petitioner and its TRAVELSMART Mark,” 20 TTABVUE 13-15, including that “[o]n or about March 23, 2013, Petitioner, d/b/a Allianz Global Assistance USA, a provider of travel insurance and travel assistance, launched its TRAVELSMART mobile app which currently delivers to its users key information on local medical providers, translations of drug and first-aid terms, and emergency phone numbers, and has used the TRAVELSMART mark in connection with the mobile app consistently since that time. (TTABVUE No. 11, p. 89-91.)” *Id.* at 13. In its reply brief, Petitioner shifts gears and claims that it actually relies on these pages only “for what they show on their face; that the news that Petitioner launched its TRAVELSMART app was widely circulated, advertised, and available to the public.”

25 TTABVUE 11. Specifically, Petitioner claims in its reply brief that its

common-law rights that support its reasonable belief of damage are established by showing that Petitioner’s TRAVELSMART brand was used and advertised in connection with those goods through websites of third parties such as IPMI Magazine, Richmond Times-Dispatch, and cision.com. Because of those promotional

activities, ordinary consumers were exposed to the TRAVELSMART mark and associate it with Petitioner and Petitioner's goods. In sum, the articles were not offered into evidence to prove the veracity of the statements asserted in them, but for what they demonstrate on their face. Accordingly, they are not hearsay.

*Id.*

This argument is foreclosed by *WeaponX*, which explains why the distinction that Petitioner purports to draw is illusory. In *WeaponX*, the Board first reiterated the rule set forth in *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010) that "Internet evidence is only admissible for what it shows on its face, and because it does not fall within an exception to the hearsay rule, will not be considered to prove the truth of any matter stated therein." *WeaponX*, 126 USPQ2d at 1041 (citing *Safer*, 94 USPQ2d at 1040). The Board then considered the opposer's "Internet evidence submitted with its notice of reliance," *id.*, which the Board described as screenshots from various websites. *Id.* at 1038. Several of the websites discussed new product lines offered under the WEAPONX mark or displayed goods or packaging bearing the mark. One of the websites displayed "a press release dated June 14, 2008 which states, *inter alia*, 'WeaponX Performance announced today that its revolutionary new spark plug is now available to consumers on its new Web site, www.weaponxperformance.com.'" *Id.* The Internet evidence also included multiple screenshots displaying the WEAPONX mark on the opposer's reputed website at weaponxperformance.com. *Id.*<sup>12</sup>

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<sup>12</sup> The domain name "weaponxperformance.com" contained the source-identifying elements of the opposer's trade name "WeaponX Performance Products Ltd.," strongly suggesting, on its face, that the website to which it resolved was the opposer's. The Board nevertheless found

The Board noted that “[b]ecause Applicant has not accepted as fact any portion of this Internet evidence, we do not deem it stipulated into the record for the truth of matters asserted therein.” *WeaponX*, 126 USPQ2d at 1040 n.17.<sup>13</sup> The Board then found that these webpages did not establish the opposer’s standing based on its alleged ownership and use of the WEAPONX mark:

[T]he printouts from the various websites submitted by Opposer with its notice of reliance show on their face that some entity is advertising products and services under the WEAPONX mark, but absent testimony from a competent witness, they are nonetheless hearsay. They do not prove that Opposer owns its pleaded WEAPONX mark or that it has offered products or services under that pleaded mark. As discussed *supra*, Opposer’s Internet evidence is only probative for what it shows on its face and not the truth of what has been printed. . . In sum, Opposer has failed to submit any evidence to prove its standing.

*Id.* at 1040 (citation omitted).

The Internet evidence in the record here consists of:

- Pages downloaded from the website at [allianztravelinsurance.com](http://allianztravelinsurance.com), which bears the copyright notice “AGA Service Company © 2020 All Rights Reserved,” and discusses and displays an “Allianz TravelSmart” and “TravelSmart” app, 11 TTABVUE 9-10, 15-17;
- A March 25, 2013 press release entitled “Allianz Global Assistance Launches TravelSmart Mobile App,” and a December 11, 2017 press release entitled “Allianz Global Assistance Releases Upgraded TravelSmart Mobile App,” *id.* at 18-19, 36-37, 91-92;
- Previews, reviews, and ratings of the “Allianz TravelSmart” or “Allianz’s TravelSmart” app, which is variously described as an app from “Allianz Global Assistance,” “Allianz Global Assistance USA,” or “AGA Service

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that the pages from that website displaying the pleaded WEAPONX mark “do not prove that Opposer is the owner of the websites . . . .” *WeaponX*, 126 USPQ2d at 1041.

<sup>13</sup> Respondent here similarly “does not accept as fact any portion of the Internet evidence submitted by Petitioner under its Notices of Reliance.” 22 TTABVUE 22 n.3.

Company,” *id.* at 11-14, 20-24, 30, 34-35, 38-43, 53-54, 65; 13 TTABVUE 7; and

- A March 23, 2013 article from the RICHMOND TIMES-DISPATCH entitled *Travelers can find emergency medical information on smartphone app*, which states that “Allianz Global Assistance has launched a smartphone app that provides travelers with emergency medical expertise,” and that the “company’s TravelSmart mobile app provides international and U.S. travelers with key information on local medical providers, translations of drug and first-aid terms, and emergency phone numbers.” *Id.* at 89-90. The article contains the photograph displayed below:



*Id.* at 89.<sup>14</sup> The same photograph also appears next to the March 25, 2013 press release on the website of cision.com. *Id.* at 91-92.

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<sup>14</sup> This image is an example of the many pages attached to Petitioner’s First Notice of Reliance that have poor resolution. The mark on the smartphone appears to be a blurry reproduction of the Allianz Global Assistance logo. 11 TTABVUE 91.

Petitioner's Internet evidence is very similar in nature to the Internet evidence that was rejected in *WeaponX* as proof of the opposer's standing. Like the pages in *WeaponX* from the opposer's reputed website at [weaponxperformance.com](http://weaponxperformance.com), the pages here from what Petitioner suggests is its website at [allianztravel.com](http://allianztravel.com) "show on their face that some entity is advertising products and services under the [TRAVELSMART] mark, but absent testimony from a competent witness, they are nonetheless hearsay. They do not prove that [Petitioner] owns its pleaded [TRAVELSMART] mark or that it has offered products or services under that pleaded mark." *WeaponX*, 126 USPQ2d at 1040.<sup>15</sup> Like the pages in *WeaponX* from "online community board forums with entries . . . that were purportedly made by Opposer discussing goods and services offered under the WEAPONX mark," *WeaponX*, 126 USPQ2d at 1041, the pages containing reviews of the TravelSmart app "cannot be taken as true." *Id.* Finally, like the press release in *WeaponX*, the press releases and articles here discussing the introduction and upgrading of the TravelSmart app are "not evidence of the truth of the matters stated" in those materials. *Id.*

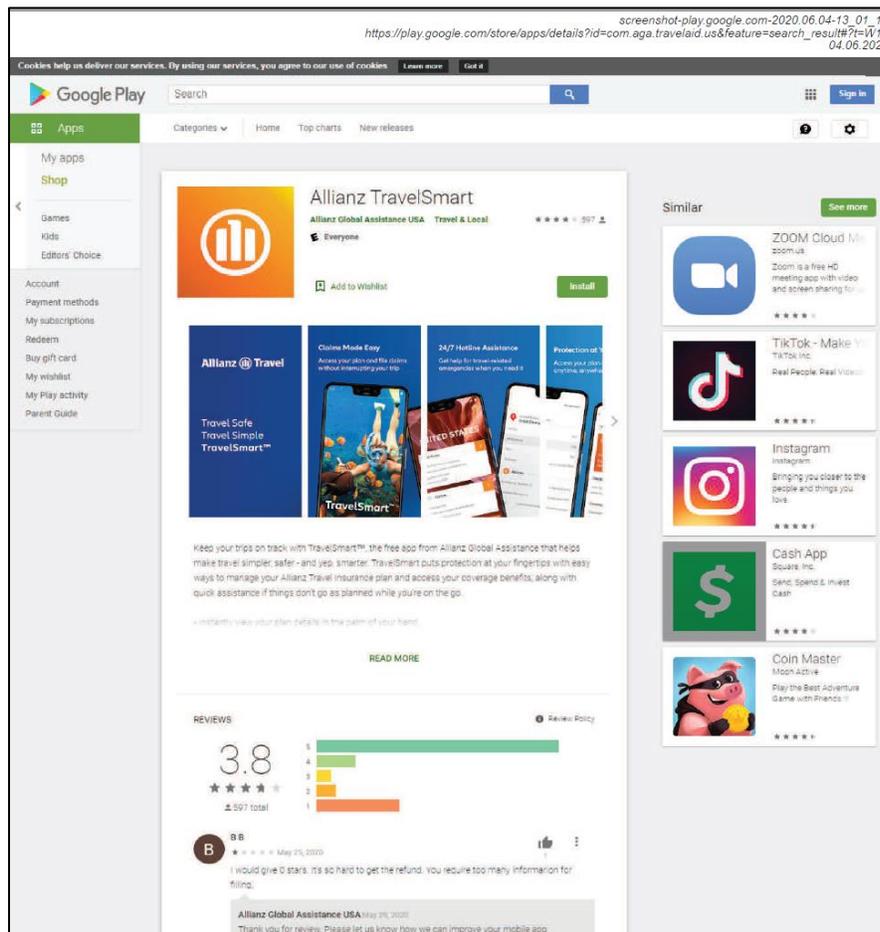
Petitioner's attempts to distinguish *WeaponX* are all unavailing. Petitioner's argument that "the articles from IPMI Magazine, Richmond Times-Dispatch, and [cision.com](http://cision.com) . . . are probative for what they show on their face; that the news that Petitioner launched its TRAVELSMART app was widely circulated, advertised, and available to the public," 25 TTABVUE 11, assumes the truth of the statement "that

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<sup>15</sup> As noted below, Petitioner is named only once in a privacy notice on the website and does not appear on the face of the website to be the source of the TravelSmart app.

Petitioner launched its TRAVELSMART app,” a fact that cannot be established by hearsay statements in the articles themselves.

Petitioner also argues that “the screenshots from the Google Store and Apple Store [that] refer[ ] to the name of the parties’ mobile applications and the numbers of downloads, ratings, and reviews of the apps” are not hearsay because hearsay is “a *person’s* oral assertion, written assertion, or nonverbal conduct, if the *person* intended it as an assertion,” *id.* at 11-12 (emphasis in original), and that “the data and texts in the screenshots cannot be hearsay because they are not a [sic] conduct intended by a human declarant to be assertive.” *Id.* at 12 (emphasis in original). We depict below a screenshot from Google Play that is alluded to in Petitioner’s argument:



11 TTABVUE 13.

As with its argument regarding the articles, Petitioner's argument regarding the screenshots assumes that the "Allianz TravelSmart" app shown and described on these pages is Petitioner's product, but we again cannot find that fact from the pages themselves. Petitioner cites *U.S. v. Lizarraga-Tirado*, 789 F.3d 1107 (9th Cir. 2015) and *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), in support of these arguments, but these cases are inapposite.

In *Lizarraga-Tirado*, an agent of the U.S. Border Patrol had recorded the coordinates of the location of the defendant's arrest on a handheld GPS device to show that the defendant had been arrested on the U.S. side of the U.S.-Mexico border, rather than in Mexico, as the defendant claimed. "To illustrate the location of those coordinates, the government introduced a Google Earth satellite image," *Lizarraga-Tirado*, 789 F.3d at 1108, which "depict[ed] the region where defendant was arrested" and "include[d] a few default labels, such as a nearby highway, a small town and the United States-Mexico border [and] a digital tack labeled with a set of GPS coordinates." *Id.* The defendant "claim[ed] that both the satellite image on its own and the digitally added tack and coordinates were impermissible hearsay." *Id.* at 1109. The court disagreed, holding that the unadorned Google Earth image, which was generated by a satellite, was not a "statement" for purposes of the rule against hearsay because, like a photograph, it was a "snapshot of the world as it existed when the satellite passed overhead." *Id.* The court further held that "the relevant assertion isn't made by a person; it's made by the Google Earth program." *Id.* at 1110.

In *Lorraine*, the court explained that in the context of electronic evidence,

[w]hen an electronically generated record is entirely the product of the functioning of a computerized system or process, such as the “report” generated when a fax is sent showing the number to which the fax was sent and the time it was received, there is no “person” involved in the creation of the record, and no “assertion” being made.

*Lorraine*, 241 F.R.D. at 564.

Here, Petitioner does not rely solely on electronic evidence, or records generated entirely by a machine, but instead cites webpages that also contain text written by humans referring to the “Allianz TravelSmart” app. The information on these pages that may be machine-generated is probative of Petitioner’s ownership of the TRAVELSMART mark only if the referenced TravelSmart app is Petitioner’s product, a fact that cannot be established from the pages themselves.

In his rebuttal argument at the oral hearing, Petitioner’s counsel argued that the photograph of the man holding the smartphone shown above, and the March 23, 2013 date of the RICHMOND TIMES-DISPATCH article in which it appears, are not hearsay because they are not statements by a person. The Ninth Circuit stated in *Lizarraga-Tirado* that a photograph was not hearsay because it “merely depicts a scene as it existed at a particular time.” *Lizarraga-Tirado*, 789 F.3d at 1109 (citing *U.S. v. May*, 622 F.3d 1000, 1007 (9th Cir. 1980)). We will accept that analysis, but even if the date appearing in the footer of the RICHMOND TIMES-DISPATCH article is entirely machine-generated and is thus not an assertion by a person, the photograph and the date in the RICHMOND TIMES-DISPATCH article would be probative of Petitioner’s ownership of the common-law TRAVELSMART mark only in the context of the article as a

whole, which contains the headline “Allianz Global Assistance presents TravelSmart, which provides information, emergency numbers” above the photograph, as well as statements in the body of the article such as “Allianz Global Assistance has launched a smartphone app that provides travelers with emergency medical expertise at their fingertips.” 11 TTABVUE 89. A picture may be worth a thousand words in some contexts, but not in this one. Unlike the satellite image in *Lizarraga-Tirado*, the photograph is not an isolated “scene as it existed at a particular time” in March 2013, *Lizarraga-Tirado*, 789 F.3d at 1109, because it appears in the article, and to find that the TravelSmart app shown in the photograph originates with Petitioner, we must find that the statements in the article that surround the photograph are true, and that “Allianz Global Assistance” is Petitioner, facts that cannot be established by the article itself.

Although Petitioner argues that the various Internet materials establish that it owns the TravelSmart mark displayed in those materials, “absent testimony from a competent witness, they are nonetheless hearsay” and “do not prove that [Ppetitioner] owns its pleaded [TRAVELSMART] mark or that it has offered products or services under that pleaded mark.” *WeaponX*, 126 USPQ2d at 1040. Petitioner thus cannot rely on its alleged ownership of the pleaded common-law TRAVELSMART mark to establish that it is entitled to petition to cancel Respondent’s registration.

Because Petitioner did not establish that it has a reasonable belief in damage that is proximately caused by the continued registration of the CHUBB TRAVEL SMART mark arising from Petitioner’s alleged ownership of its pleaded application to register

TRAVELSMART or its pleaded common-law mark, Petitioner has failed to establish that is entitled to petition to cancel Respondent's registration. The Petition for Cancellation must be denied on this ground alone.

#### IV. Priority

Petitioner's failure to establish that it is entitled to petition to cancel Respondent's registration is sufficient to resolve this case, but because the same hearsay problems apply to its use of the Internet materials as evidence of its priority on its Section 2(d) claim, we will also discuss why Petitioner failed to prove priority.

Section 2(d) of the Trademark Act "provides a ground for cancellation of a registration that has been on the Principal Register for fewer than five years on the basis of a petitioner's 'ownership of 'a mark or trade name previously used in the United States . . . and not abandoned,'" *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1604 (TTAB 2018) (quoting *Exec. Coach Builders, Inc. v. SPV Coach Co.*, 123 USPQ2d 1175, 1180 (TTAB 2017) (internal quotation omitted)), and a likelihood of confusion. Petitioner "must prove by a preponderance of the evidence that its common law rights were acquired before any date upon which [Respondent] may rely." *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*3 (TTAB 2020) (quoting *Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1834 (TTAB 2013)).<sup>16</sup>

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<sup>16</sup> Petitioner argues that it "has made of record at least 3 internet publications which show Petitioner's mark in connection with its mobile application has been actively marketed, advertised and known to the public prior to Registrant's alleged first use," that "Registrant offered *no* evidence in opposition," and that "[t]he weight of evidence by Petitioner clearly overbears the weight of evidence by Registrant (which is none) in both quantity and quality." 25 TTABVue 16-17 (emphasis in original). Petitioner further argues that Respondent "did not offer any evidence concerning its use of the CHUBB TRAVEL SMART mark at all." *Id.* at 16. These arguments misapprehend the meaning of "preponderance of the evidence."

Petitioner acknowledges that “[i]n the absence of a federal registration, [it] must establish its prior trademark rights through actual use or through use analogous to trademark use,” 25 TTABVUE 14, and argues that it is the “senior user of its mark and has superior rights over [Respondent’s] alleged rights in its CHUBB TRAVEL SMART mark . . . because the date Petitioner first used its mark in commerce predates both [Respondent’s] first use date of its mark and the filing date of its trademark application.” 20 TTABVUE 18. Respondent relies on the April 10, 2017 filing date of the application that matured into its registration, 22 TTABVUE 22, so Petitioner must show that it acquired proprietary rights in its alleged common-law TRAVELSMART mark prior to that date.

In the portion of the *WeaponX* opinion discussing the opposer’s use of Internet evidence to establish priority, the Board found that the opposer

has not established that it acquired ownership rights in its pleaded WEAPONX mark prior to October 29, 2013. That is, there is insufficient evidence to conclude that the pleaded mark is being used in commerce by Opposer, or, for the purpose of establishing priority, that it was in use prior to October 29, 2013. . . . Opposer’s evidence consists solely of Internet printouts submitted under a notice of reliance and there is no accompanying testimony attesting to the truth of the matters contained therein. For example, the Internet printouts submitted by Opposer consisting of online community board forums with entries dated December 6, 2006 and February 11, 2011 that were purportedly made by Opposer discussing goods and services offered under the WEAPONX mark cannot be

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Priority must be proven by Petitioner as an element of its prima facie case under Section 2(d). *Kemi Organics*, 126 USPQ2d at 1605. As Respondent correctly puts it, “it is not up to [Respondent] to dispute Petitioner’s priority, it is up to Petitioner to affirmatively prove it,” 22 TTABVUE 23, and as discussed below, Petitioner’s evidence is insufficient to do so. In deciding whether Petitioner proved priority by a preponderance of the evidence, insufficient evidence does not prove priority simply because there is no contrary evidence.

taken as true. Additionally, screenshots of webpages with the domain name [www.weaponxperformance.com](http://www.weaponxperformance.com) that display the mark WEAPONX, on their face, do not prove that Opposer is the owner of the websites or that the mark displayed on the websites is being used by Opposer for the goods and services identified on the webpage. Similarly, a press release dated June 14, 2008 posted on the website [www.pr.com](http://www.pr.com) which states, *inter alia*, “WeaponX Performance announced today that its revolutionary new spark plug is now available to consumers on its new Web site, [www.weaponxperformance.com](http://www.weaponxperformance.com)” is not evidence of the truth of the matters stated in the press release.

*Id.* at 1041.

As in *WeaponX*, “[t]he only evidence submitted by [Petitioner] to demonstrate its priority of use is the Internet evidence submitted with its notice[s] of reliance, as described above,” *WeaponX*, 126 USPQ2d at 1041, and only five of the webpages mentioning a TravelSmart app bear dates earlier than April 10, 2017. These pages display the March 23, 2013 RICHMOND TIMES-DISPATCH article discussed above, 11 TTABVUE 89-90; a March 25, 2013 press release on the website of [cision.com](http://cision.com) entitled “Allianz Global Assistance Launches TravelSmart Mobile App,” *id.* at 91-92; a May 7, 2013 press release on the website at [ipmimagazine.com](http://ipmimagazine.com) entitled “Allianz Global Assistance Launches TravelSmart Mobile App,” *id.* at 18; a January 19, 2016 article on the website of [propertycasualty360.com](http://propertycasualty360.com) entitled *16 of the coolest P&C insurer mobile apps*, *id.* at 26-30, which refers to “The Allianz Global Assistance TravelSmart app,” *id.* at 30, and a June 26, 2016 article on the website of [Business Insider](http://BusinessInsider.com) at [businessinsider.com](http://businessinsider.com) entitled *Here are the safety tips you need to know if you’re planning to travel to Europe*, *id.* at 20-24, which refers to “Allianz’s TravelSmart app.”

*Id.* at 22.

“As already mentioned, Internet evidence is only admissible for what it shows on its face, and because it does not fall within an exception to the hearsay rule, will not be considered to prove the truth of any matter stated therein.” *WeaponX*, 126 USPQ2d at 1041. “[A]ssertions appearing in the printouts submitted by [Petitioner] under notice of reliance cannot be used to demonstrate its priority without testimony corroborating the truth of this matter.” *Id.* (citing *Safer*, 84 USPQ2d at 1040).

Petitioner’s arguments to the contrary are again unpersuasive. Petitioner first tries to distinguish *WeaponX* on the ground that the “holding in *WeaponX* is inapposite here because as the Board noted, the evidence provided merely show [sic], on their [sic] face, that ‘some entity [not necessarily the Opposer] is advertising products and services under the WEAPONX mark.’” 25 TTABVUE 13 (emphasis added by Petitioner) (quoting *WeaponX*, 126 USPQ2d at 1040). Petitioner argues that “[t]hat is not the case here,” *id.*, because “[a]ll of the printed publications in the record point to one particular name that is completely different from Registrant’s: Allianz Global Assistance, Petitioner’s brand,” *id.*, and that “these printed publications differ markedly from those at issue in *WeaponX* because they clearly identify that Petitioner was using the mark.” *Id.* Petitioner also relies on the photograph from the RICHMOND TIMES-DISPATCH shown and discussed above “displaying Petitioner’s travel insurance mobile application screen and an enlarged version of that screen, displaying not only Petitioner’s brand Allianz Global Assistance on the upper left-hand corner of it and but also Petitioner’s TravelSmart mark on its upper right-hand corner.” *Id.* Petitioner concludes that “not only do these printed publications differ

markedly from those at issue in *WeaponX* because they clearly identify that Petitioner was using the mark, they also are not hearsay.” *Id.*

The cited Internet materials that predate Respondent’s filing date do not mention Petitioner,<sup>17</sup> and Petitioner did not prove that “Allianz Global Assistance” is “Petitioner’s brand,” *id.*, by “testimony from a competent witness,” *WeaponX*, 126 USPQ2d at 1040, or by other means. The holding in *WeaponX* that pages from what appeared to be the opposer’s website “show on their face that some entity is advertising products and services under the WEAPONX mark, but absent testimony from a competent witness, they are nonetheless hearsay [and] do not prove that Opposer owns its pleaded WEAPONX mark or that it has offered products or services under that pleaded mark,” *id.*, applies with full force here to the mentions of the Allianz TravelSmart app in the cited materials. *WeaponX* teaches that it is necessary to connect the dots between a mark displayed on a webpage, its putative owner, and the goods or services with which it is used, by evidence **other than the webpage itself**, such as “testimony from a competent witness,” *id.*, but Petitioner offered none here.

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<sup>17</sup> Petitioner is identified in a privacy notice that is buried in a June 4, 2020 screenshot from the website at allianztravel.com. The notice reads as follows: “AWP USA Inc. and its affiliates, including Jefferson Insurance Company and AGA Service Company d/b/a Allianz Global Assistance are committed to protecting your privacy. . . .” 11 TTABVUE 9. Text elsewhere on the website urges visitors to “Download TravelSmart for free\* today, and stay protected,” and the footnote signaled by the asterisk states that “Allianz Global Assistance does not charge for this service.” *Id.* On its face, this text associates the TravelSmart app with “AGA Service Company d/b/a Allianz Global Assistance,” which is identified as Petitioner’s affiliate. In any event, as discussed above, these statements are not admissible to prove the truth of the statements.

Petitioner next reprises its argument regarding the non-hearsay status of the photograph of the person holding a smartphone with an open app, 25 TTABVUE 14, claiming that “the images are probative of what they demonstrate *on their face*: a mobile application named TRAVELSMART was offered by Petitioner in 2013, and a consumer was using that mobile application in 2013.” *Id.* (emphasis in original). Petitioner cites *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002) and *McKee v. Audible, Inc.*, No. CV 17-1941-GW (EX), 2017 WL 7388530 (C.D. Cal. 2017), *id.*, which stand for essentially the same propositions as the *Lizarraga-Tirado* and *Lorraine* cases discussed above. This version of Petitioner’s argument is meritless because it once again assumes that “a mobile application named TRAVELSMART was offered by Petitioner in 2013,” *id.* at 14, a fact that we cannot find from the article and press release themselves, and that was not otherwise established.

Petitioner next argues that “even if [Respondent] were correct that the evidence is hearsay (it is not, for the reasons discussed above), even hearsay is admissible for purposes other than the truth of the matter asserted,” *id.*, and that “at a minimum, the evidence demonstrates a public awareness of Petitioner’s mark dating back to 2013.” *Id.* Petitioner cites *Cross Trailers, Inc. v. Cross Trailer Mfg. & Sales, LLC*, 363 F. Supp. 3d 774 (W.D. Tex. 2018), as supporting authority. *Cross Trailers* does indeed say that “obviously, a statement offered for a purpose other than the truth of the matter asserted therein is not hearsay,” *Cross Trailers*, 363 F. Supp. 3d at 785, but here the “evidence demonstrates a public awareness of Petitioner’s mark dating back

to 2013,” 25 TTABVUE 14, only if we accept as true the various statements on the webpages that the TravelSmart app was introduced in 2013, and also find, from the webpages themselves, that the app originated with Petitioner. These findings are foreclosed by *WeaponX*.

Petitioner next quotes a non-precedential Board decision, *Gange v. Agility Sports LLC*, Opp. No. 91194831, 2013 WL 6858021, at \*3 (TTAB 2013), for the proposition that prior rights can be established through evidence of “use in advertising brochures, trade publications, catalogues, newspaper advertisements and internet web sites, *which creates public awareness of the designation as a trademark identifying the party as a source.*” *Id.* at 14-15 (emphasis added by Petitioner). Petitioner also cites *Brooks v. Creative Arts by Calloway, LLC*, 93 USPQ2d 1823 (TTAB 2009), *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 USPQ2d 48324 (TTAB 2020), and *Ricardo Media, Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355 (TTAB 2019), in support of the argument that the “internet publications from 2013 as well as the January 19, 2016 article from PropertyCasualty360.com that Petitioner placed into evidence in its First Notice of Reliance are unquestionably admissible for what they show on their face, which includes the fact they were published on certain dates and that they contain the subject text or images.” *Id.* at 15. None of the cited cases supports Petitioner’s arguments regarding priority.

*Gange* actually undercuts Petitioner’s argument because the Board in that case rejected Petitioner’s purported distinction between use of materials only “for what they show on their face,” *id.*, and use of the materials to establish priority. In *Gange*,

as here, the plaintiff relied on materials submitted under notice of reliance to establish priority. These included “newspaper articles as well as . . . radio and television transcripts featuring opposer’s SUNBUM products.” 63 TTABVUE 8 (Opposition No. 91194831).<sup>18</sup> Consistent with the Board’s later analysis in *WeaponX*, the Board held in *Gange* that “[a]lthough these materials are admissible for what they show on their face, they constitute hearsay as per Federal Rules of Evidence 801 and 802, **if they are offered for the truth of the matter asserted, i.e., that opposer was using its pleaded mark SUNBUM on the dates that the articles were written or the dates that the television or radio shows were broadcasted.**” *Id.* at 8-9 (emphasis added).<sup>19</sup> The Board held that “[u]nder the hearsay rule, we cannot accept as true any of the dates associated with opposer’s materials submitted under notice of reliance to prove opposer’s priority,” and that “in the absence of credible testimony from opposer, he has failed to establish, through competent, admissible evidence, use of his pleaded word mark SUNBUM in connection with lounge chairs or apparel prior to applicant’s constructive use date.” *Id.* at 10. The Board noted that, like Petitioner here, the plaintiff in *Gange* “could have testified as to his use of his pleaded mark to establish priority, preferably

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<sup>18</sup> We will cite to the publicly accessible TTABVUE pages for this case to permit readers to access the decision in the event that they do not have access to the private Westlaw database.

<sup>19</sup> The Board also found that the opposer’s “remaining evidence obtained from the Internet (for example, opposer’s Twitter advertisements and archived web sites), although admissible for what they show on their face under *Safer*, also constitute hearsay and may not be relied upon for the truth of the matter asserted, i.e., that opposer was using its pleaded SUNBUM mark in commerce.” 63 TTABVUE 9 (Opposition No. 91194831).

corroborated with documentary evidence authenticated by opposer (for example, sales figures or invoices),” *id.*, but did not do so.

In *Brooks*, the sole issue on the opposer’s Section 2(d) claim was “whether Opposer can establish rights in THE CAB CALLOWAY ORCHESTRA [mark] prior to the filing date of the opposed application, which is July 23, 1999.” *Brooks*, 93 USPQ2d at 1827. In the portion of the opinion cited by Petitioner, the Board stated that certain exhibits submitted under a notice of reliance, “which comprise[d] printed publications dated after July 23, 1999, have limited probative value in that we cannot take the statements contained in the publications as establishing the truth of the matters asserted therein,” *id.*, but found that “they are relevant, at a minimum, to show continued consumer exposure to opposer’s asserted mark THE CAB CALLOWAY ORCHESTRA in connection with his name.” *Id.* They were not offered to prove priority, however, which was the subject of certain stipulated facts and several declarations. *Id.* at 1828. Here, regardless of Petitioner’s multiple tries to disguise the purpose for which its Internet evidence is used, it is clear from Petitioner’s main brief that it intends to (and necessarily must) use the evidence to establish “that Petitioner commenced using its TRAVELSMART mark for its travel mobile app since [sic] early 2013,” 20 TTABVUE 17, as there is no other evidence of priority in the record. As the Board held in *Brooks*, “we cannot take the statements contained in the [materials] as establishing the truth of the matters asserted therein.” *Id.* at 1827.

In *Spiritline Cruises*, which involved a claim that the applied-for mark was primarily geographically descriptive under Section 2(e)(2) of the Trademark Act, the

Board reiterated that “we consider Internet printouts and other materials properly introduced under a notice of reliance without supporting testimony only for what they show on their face rather than for the truth of the matters asserted therein.” *Spiritline Cruises*, 2020 USPQ2d 48324, at \* 2. With respect to certain archived Internet evidence from the Wayback Machine, the Board held that “Wayback Machine printouts, like other Internet webpages that display a URL and date, generally can be admissible under a notice of reliance as self-authenticating Internet evidence,” but that if such evidence was “supported solely with a notice of reliance, such Internet evidence would be admissible only for what it shows on its face.” *Id.*, at \*3 (citing *WeaponX*, 126 USPQ2d at 1040). The Board noted that “[h]ere, however, Opposer seeks to rely on the Wayback Machine evidence in this case not only for what these pages show on their face, but also to establish that third-party websites displayed ‘Charleston Harbor Tours’ **on various dates in the past**” and that “Opposer needed to, and properly did, use appropriate witness testimony to authenticate the printouts and lay the foundation to support that intended evidentiary use.” *Id.*, at \*3-4 (emphasis in original). The Board also held that “to the extent the Wayback Machine printouts are offered to show how the webpages appeared on particular dates — the ‘truth’ of the capture as of the archive date — Mr. Butler's testimony establishes that the printouts qualify under the business records exception,” *id.*, at \*4, indicating that when offered for that purpose, the evidence was hearsay, but was admissible under the cited exception to the rule against hearsay.

Finally, *Ricardo Media* also reiterated that “[a]s for articles, whether from the Internet or printed publications, Applicant is correct that because they are not accompanied by testimony, they may not be considered for the truth of the matters asserted therein. Nevertheless, they are admissible for what they show on their face.” *Ricardo Media*, 2019 USPQ2d 311355, at \*2. The Board noted that “sometimes what Internet printouts and printed publications show on their face is relevant to trademark cases, including likelihood of confusion cases,” *id.*, but the materials were not offered to prove priority. *Id.*, at \*4-5.

We reject Petitioner’s argument that even if we do not accept the truth of what is stated in the Internet materials, what is “shown on the face” of those materials establishes “that Petitioner’s mark has been known to the public in 2013, that its mobile application goods bearing the TRAVELSMART mark have been widely advertised or marketed in 2013, and that the TRAVELSMART brand has been promoted in these publications targeting a class of consumers in travel insurance industry in 2013.” 25 TTABVUE 15-16.<sup>20</sup> To hold otherwise would be to create an exception to the rule set forth in *WeaponX* that would swallow the rule itself.

“In sum, [Petitioner] has not proven it is the owner of the mark pleaded in the [Petition for Cancellation], and even if it did prove ownership, it has not

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<sup>20</sup> In connection with this argument, Petitioner also cites *Wagner Elec. Corp. v. Raygo Wagner, Inc.*, 192 USPQ 33 (TTAB 1976), for the proposition that “advertisements were probative of [the] fact that opposer advertised under its mark in particular publications on those dates.” 25 TTABVUE 16 (citing *Wagner Elec.*, 192 USPQ at 36 n.10). Petitioner did not offer advertisements in printed publications under its Notices of Reliance, and *Wagner Elec.*, which was decided in 1976, did not involve Internet materials offered to prove priority, which must be supported by appropriate witness testimony, *WeaponX*, 126 USPQ2d at 1034; *cf. Spiritline Cruises*, 2020 USPQ2d 48324, at \* 2.

demonstrated its priority. Accordingly, [Petitioner] cannot prevail on its claim of likelihood of confusion.” *WeaponX*, 126 USPQ2d at 1041-42. The Petition for Cancellation must be denied for this reason as well.

“Whether adequate proof was in fact available but simply was not gathered and proffered by [Petitioner] is not a subject on which we can, should or do speculate. Rather, we must take the record as [Petitioner] made it.” *T.A.B. Sys. v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879, 1884 (Fed. Cir. 1996). The record as Petitioner made it does not show that Petitioner is entitled to petition to cancel Respondent’s registration under Section 2(d), or that it has the required priority of use to prevail on that claim.

**Decision:** The Petition for Cancellation is denied.